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In the Supreme Court of the United States.

OCTOBER TERM, 1920.

LAWRENCE AMOS, PLAINTIFF IN ERROR,
v.
UNITED STATES OF AMERICA. } No. 114.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF SOUTH CAROLINA.

BRIEF ON BEHALF OF THE UNITED STATES.

STATEMENT OF CASE.

The plaintiff in error was convicted on two counts, charging, respectively, the removing and concealing of distilled spirits on which the tax had not been paid in violation of Section 3296 of the Revised Statutes.

QUESTION INVOLVED.

The sole ground upon which a reversal is sought is the refusal of the trial court, upon a petition filed after the trial began, to order certain whisky and other articles claimed to have been taken from his store and house by an unlawful search and seizure, returned to the plaintiff in error, and the subsequent admission in evidence of a part of this whisky.

How the question arises.

After the jury had been sworn but before any testimony had been offered on behalf of the United States, the plaintiff in error filed a petition alleging that certain property belonging to him, viz, a piece of piping, two half-pint or pint whisky bottles said to contain what was said to be "blockade" whisky, and a quart bottle said to contain "blockade" whisky, had been unlawfully seized by certain officers of the United States and was being unlawfully held by the district attorney, marshal, and clerk in violation of plaintiff in error's constitutional rights; that the district attorney intended to use this property in evidence against him at the trial of said indictment. It prayed that the district attorney, marshal, and clerk be required to return said property to him and that the district attorney be denied the use of the same as evidence. (R. 10, 11.) It appears that the petition was read and the application heard and denied. It does not appear, however, what, if any, evidence was offered in support of the application. Nor does it appear whether it was denied for want of supporting evidence or because not seasonably made. (R. 11.)

The trial proceeding, two deputy collectors of internal revenue testified that they searched plaintiff in error's store and house, with the consent of his wife, that they found "blockade" whisky concealed in both places, which they seized; that upon plaintiff in error's arrest he admitted he had tried to make whisky and that the can he had used was

about the place and would be given to them by his wife if they went back. They admitted that they had no search warrant. Part of the whisky seized in the house was admitted in evidence. The remainder of the property mentioned in the petition was not offered. The plaintiff in error moved *that the testimony of these two witnesses be stricken out as inadmissible*, but the motion was denied. (R. 11, 12.)

ARGUMENT.

I.

The petition was properly overruled because not filed until after the trial had begun.

As stated above, the petition was not filed until after the trial jury had been empaneled and sworn. It is settled beyond question that the trial had therefore begun when the application was made,[1] and the question is whether a petition for the return of goods claimed to have been unlawfully seized may, consistently with the decisions of this court, be made after the trial has begun. In *Weeks* v. *United States*, 232 U. S. 383, 388, 393, it appeared that the defendant *before the trial* presented a petition for the return of papers which was granted in part and denied in part, with a reservation by the court of the right to pass on the pertinency of the papers at a later date. Subsequently, after the jury had been sworn but before any testimony was offered, he "again

[1] *Hopt* v. *Utah*, 110 U. S. 575; *Lewis* v. *United States*, 146 U. S. 370, 375, 376; *Caples* v. *State*, 3 Okla. Cr. 72, 93–95; *State* v. *Jackman*, 31 Nev. 511; *Wills* v. *Com.*, 85 Ky. 68, 71; *State* v. *Maddox*, 90 Kans. 739 and cases cited.

urged his petition" for the return of the rest of the property, which was denied. It will be observed, therefore, that what occurred in the Weeks case, after the jury was sworn, was merely a renewal of an application as to which the trial court had previously not only been fully advised, but in reality rendered its decision by denying the return of those papers which were pertinent. And that this court considered the earlier application the important—if not vital—one is shown by the opinion where it is said (232 U. S. 393):

> The accused, *without awaiting his trial, made timely application to the court* for an order for the return of these letters, as well as other property. This application was denied, the letters retained, and put in evidence, after a further application at the beginning of the trial, both applications asserting the rights of the accused under the fourth and fifth amendments to the Constitution. [Italics ours.]

The opinion later proceeds to consider and explain the case of *Adams* v. *New York*, 192 U. S. 585. The Adams case (it is stated) was based on the principle laid down in 1 Greenleaf, §254a, viz, that courts "in the course of a trial" would not try the issue as to how competent testimony had been procured (232 U. S. 395); and again (232 U. S. 396) the doctrine is approved—

> that a court will not *in trying a criminal cause* permit a collateral issue to be raised as to the source of competent testimony.

Since, therefore, this court in the Weeks case clearly pointed out that the petition in that case had been filed (and in effect decided) before the trial began, and affirmed the rule of the Adams case that such an issue can not be raised in the course of the trial, or while the court is trying the cause, it follows necessarily that a petition for return of goods, seeking to raise the issue that they have come into the possession of the prosecuting officers through an unreasonable search and seizure, filed after the trial has begun, is too late. It can surely make no difference that the seized articles themselves had not yet been offered in evidence. The trial would be just as much hindered and delayed by the tender of this collateral issue after the jury was sworn and officiating as it would be at any later period.

II.

There was no error in the admission of the evidence unless the previous action of the court in refusing to return the seized articles was erroneous. And the ruling of the court in that regard is not open to review on this record.

Even if it be assumed that the petition in this case was seasonably filed so that the court could properly have entertained it, the record still discloses no ground upon which the judgment can be reversed. As shown above, it is well settled that evidence, even when it has been obtained by an unlawful search and seizure, can not be excluded if otherwise competent, merely upon objection made when it is offered in the progress of the trial. The remedy of the person

aggrieved in such a case is to petition the court for the return of property or papers so seized and have his petition acted on before proceeding with the trial. If the court erroneously denies the prayer of the petition, and as a result property or papers which should have been returned are subsequently used in evidence, a conviction so obtained is subject to be reversed. The ground of reversal, however, is that upon a seasonable application the court refused to return articles unlawfully taken. This in connection with the subsequent use of such articles in evidence is held to be a violation of the defendant's constitutional rights. The mere presentation of a petition, even when seasonably presented, however, does not entitle the defendant to have his property returned.

The petition must be supported by evidence, or at least the offer of evidence, before the judge can be put in error for denying its prayer. If the ruling of the judge upon the case presented to him under the petition be not erroneous, then of course the evidence is admissible on the trial, and its admission is not error. Although a petition may be sufficient on its face, if the evidence offered in support of it shows that its allegations are not true, or fails to show that they are true, the judge rules correctly when he denies the prayer. If the defendant does not offer to support his petition by proof, he can not complain if it is overruled. And if at the time the petition is presented to the court for a hearing he fails to make out his case, he can not of course complain if the court, when the evidence is offered in the progress

of the trial, refuses to stop the trial and retry the issue which could have been properly tried under his petition. It is obvious, therefore, that before this court can say that a judge was in error in denying the prayer of a petition of this kind, it must have before it the record upon which the trial judge acted when he denied the petition. Certainly, this court can not say that the trial court was in error unless it knows what was offered in the court below in support of the petition. In the present case the record is wholly silent on this point. It merely says that the petition was read and the application heard and denied. If the petitioner contented himself with reading his petition and asking that its prayer be granted, and for aught the record shows this is what he did, the judge acted properly in overruling the petition. If he offered proof in support of his petition, and the trial judge regarded the proof as insufficient, it was his duty to overrule the petition. In that event, a review of his action could not be had without bringing to this court the evidence upon which he acted. That has not been done. The only evidence set out in the record is the testimony of certain witnesses in the progress of the trial of the criminal case. It is respectfully submitted, therefore, that this court can not say whether the trial judge acted properly or erroneously in overruling the petition. And unless this action can be said to be erroneous, there was certainly no error in admitting the evidence offered on the trial.

III.

No prejudice accrued to plaintiff in error from the denial of the petition.

It is clear from the decision in *Weeks* v. *United States*, 232 U. S. 383, that the denial of the petition for the return of the seized articles can not be assigned as error *in the criminal case* unless the articles were in some way used improperly against the defendant at the trial. Perhaps the failure of the judge to order their return might be reached in some other proceeding, such as a mandamus, but, for example, if the articles were not used *in any way* at the trial, it is clear that the defendant was not prejudiced *in that proceeding* by the failure to return them, and can not, therefore, *in that proceeding* properly take exception to the action of the court in denying the petition for their return. This, we assume, will be admitted. But the same conclusion necessarily follows if it appear at the trial that the defendant waived (as he may) his constitutional right to object to the search and seizure. In such event, he is, in the eye of the law, no more prejudiced by the denial of the petition than if the articles had not been used against him at all. Such is the case at bar. The bill of exceptions (R. 11, 12) shows, not only that, when the revenue officers stated their character and purpose, the wife of the plaintiff in error, who, in his absence, was in charge of both his store and his home, consented to and aided their search, but also that the plaintiff in error himself

(who appeared on the scene after the search had been made (R. 12)) told them afterwards that the can he had used to make whisky was somewhere about the place, and if he went back and told his wife to give the officers this can they could get it. These actions of the wife and of the plaintiff in error himself, both having full knowledge of the situation and no force or coercion being used, clearly constituted a waiver of the right of plaintiff in error, if any he had. The case in this aspect can not be distinguished from *Commonwealth* v. *Tucker*, 189 Mass. 457, 470; *Grim* v. *Robinson*, 31 Neb. 540, 542, 543; *Smith* v. *McDuffee*, 72 Oregon, 276, 286, 287; and *State* v. *Griswold*, 67 Conn. 290, 304, 305, 308, 311.

The bill of exceptions does not contain all the evidence, e. g., it appears that the plaintiff in error testified on his own behalf. (R. 9.) Nor does it contain the charge of the court. We have a right to presume that upon all the testimony it clearly appeared that the revenue officers entered plaintiff in error's premises, not unlawfully by a trespass, but by the invitation and with the consent of plaintiff in error and his wife acting as his representative in his absence. The entry and search, therefore, were entirely lawful, and no claim is (or at any rate can be) made that, if the entry and search were lawful, the seizure of tax contraband articles without a warrant is not entirely reasonable, and therefore not affected by the fourth amendment even if the invitation and consent did not extend to the seizure as well as to the search.

Moreover, it should be especially noted that, according to the bill of exceptions (R. 11), the only use made of the seized articles was to admit in evidence a portion of the whisky. *To this admission the plaintiff in error made no objection.* It was not until the testimony of the revenue officers was all in that he moved to exclude all of it, although portions of it had no bearing on the question of an unreasonable search and seizure. This action of plaintiff in error constituted a clear waiver, in the most formal manner, of his right to object to the manner in which the whisky had been obtained.

CONCLUSION.

The judgment of the trial court should be affirmed.

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